

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Michalakellis, Dimitri v LMM Holdings Pty Ltd (No 2)* [2020] QIRC 024

PARTIES: **LMM Holdings Pty Limited**
(First Applicant)

&

Reesby, Grant
Second Applicant

&

Gibson, Sam
Third Applicant

v

Michalakellis, Dimitri
Respondent

CASE NO: AD/2018/83

PROCEEDING: Application for security for costs

DELIVERED ON: 14 February 2020

HEARING DATE: 18 October 2019

MEMBER: Knight IC

HEARD AT: Brisbane

ORDER[S]: **1. The application for security for costs is refused.**

CATCHWORDS: INDUSTRIAL LAW – ANTI-DISCRIMINATION – SECURITY FOR COSTS – impecuniosity - capacity to pay an

adverse costs order – likelihood of an adverse costs order – prospects of success – genuineness of the proceeding – timing of application – stultification – litigant is a natural person.

LEGISLATION:

Anti-Discrimination Act 1991 (Qld)

Industrial Relations Act 2016 (Qld) s 11(4)(a)

CASES:

Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd [2012] QCA 114

Bellaluz Pty Ltd v Westpac Banking Corp [2014] QSC 273

Hyperion Technology Pty Ltd v Queensland Motorways Ltd [2013] QSC 20

Kiefel v State of Victoria [2014] FCA 604

Knight v Beyond Properties Ltd [2005] FCA 764

Meribee Pastoral v ANZ Banking Group 193 CLR 502

Ninan v St George Bank Ltd (2012) 294 ALR 190

Pearson v Naydler [1977] 1 WLR 899

PS Chellaram & Co Ltd v China Ocean Shipping Co (1991) 102 ALR 321

Robson v Robson [2008] QCA 36

Soh v Commonwealth [2008] FCA 1524

Suncare Constructions Australia Pty Ltd v Gainspace (Mackay) Pty Ltd [2016] QSC 67

TT and Ors v Lutheran Church of Australia Queensland District and Ors [2013] QCAT 48

Ultimate Property One Management Pty Ltd v Body Corporate for the Pivotal Point Residential CTS 33550 [2017] QCAT 424

Wadsworth v Akers and Woolworths Ltd
trading as Big W Discount Stores [2007]
QADT 17

APPEARANCES:

Mr M Procter of Franklin Athanasellis Cullen
Employment Lawyers, for the Applicants.

Mr D Michalakellis, the Respondent in person.

Reasons for Decision

- [1] Mr Dimitri Michalakellis has lodged an anti-discrimination complaint against LLM Holdings (Brisbane BMW), Grant Reesby and Sam Gibson (the Applicants). He claims he was discriminated against by Mr Reesby on the basis of his race and imputed sexuality, while working as a contract spray painter at Brisbane BMW. Mr Michalakellis says he was also victimised after making a complaint about Mr Reesby's conduct.
- [2] The conduct complained of by Mr Michalakellis extended to Mr Reesby bullying him and making adverse comments about the colour of his sandshoes and the pop music he liked to follow. Mr Michalakellis maintains Mr Reesby also called him various names, including "fairy features", "poof", "homo", "faggot" and "paint poof", which led him to think Mr Reesby considered he was a homosexual. Mr Reesby denies making such homosexual slurs.
- [3] Mr Michalakellis is now pressing to have his complaint determined by the Commission, but the Applicants are concerned he will have insufficient resources to pay any adverse costs order that might be made, in the event he is unsuccessful with his complaint.
- [4] The Applicants have requested the Commission issue a security for costs order in the amount of \$45,000.00, which it considers to be reasonable when measured against the total costs incurred, to date. The Applicants have also requested the determination of Mr Michalakellis' complaint to be stayed, until he pays the security.
- [5] The source of power for the Queensland Industrial Relations Commission (the Commission) to make orders in respect of costs for proceedings under the *Anti-Discrimination Act 1991* (Qld) (AD Act), including an order directing a party to furnish security for costs, is found in section 548 and Schedule 2 of the *Industrial Relations Act 2016* (Qld) (IR Act).
- [6] Under the IR Act, the Commission may award a party's costs for a proceeding. It may also require a party to give an Applicant security for the Applicant's costs. It is also open to the Commission to make an order staying a proceeding, or the part of a proceeding against the Applicant party until the security is given.

- [7] In deciding whether to order security for costs the Commission must achieve a balance between ensuring that adequate protection is provided to the Applicants in the event they are successful in obtaining a costs order at the conclusion of the substantive proceedings, and unnecessarily barring an impecunious Respondent from accessing the substantive proceedings.¹
- [8] Therefore, the issues the Commission must consider are:
- (a) Is there a significant risk Mr Michalakellis will be unable to pay an adverse costs order?
 - (b) What is the likelihood of an adverse costs order being made against Mr Michalakellis?
 - (c) Will the making of a security for costs order prevent Mr Michalekellis from having his complaint determined?
 - (d) What other matters should the Commission consider when determining whether to make a security for costs order?
 - (e) Should the Commission make an order for security for costs in the amount of \$45,000.00 or some other amount?
- [9] In balancing those considerations, the Commission may also have regard to any of the following matters:
- (a) the financial circumstances of the party to the proceeding;
 - (b) the prospects of success or merits of the proceeding or the part of the proceeding against the Applicant party;
 - (c) the genuineness of the proceeding or the part of the proceeding against the Applicant party;
 - (d) anything else the tribunal considers relevant.²

¹ *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 744, 47.

² *Industrial Relations Act 2016* (Qld) Sch 2, s 11(4).

[10] Other principles or considerations relevant to the making of orders for security of costs by both Courts and tribunals in applications for security of costs include:

- There is no absolute rule to control the exercise of the discretion, and what should be done in each case depends on the circumstances, with a leading consideration being the interests of justice;³
- It is relevant to consider whether the party against whom security for costs is sought is a natural person or a corporation;⁴
- Such applications should be brought promptly;⁵
- The overall onus remains on the Applicant seeking an order for security for costs to establish the prerequisites for the order;⁶
- In circumstances where the Applicant has established a prima facie entitlement to an order for security, the evidentiary onus shifts to the Respondent to satisfy the court that, taking all the relevant factors into account, the court's discretion ought to be exercised by either refusing to order security, or by ordering security in some lesser amount than is sought;⁷
- The making of an order for security for costs should not be oppressive in that it would stifle a reasonably arguable claim.⁸

Is there a significant risk Mr Michalakellis will be unable to pay an adverse costs order?

The financial circumstances

[11] Mr Michalakellis told the Commission he ceased providing services as a spray painter for the Applicants after he was subjected to multiple forms of bullying, harassment, discrimination and victimisation contravening the AD Act.

[12] He maintains he was diagnosed with severe anxiety and depression due to how he was treated. According to Mr Michalakellis, his treating General Practitioner and Psychologist have both advised him that he is currently unable to work. He told the

³ *Meribee Pastoral v ANZ Banking Group* 193 CLR 502, 513.

⁴ *Knight v Beyond Properties Ltd* [2005] FCA 764, 32-33.

⁵ *Base 1 Projects Pty Ltd v Islamic College of Brisbane Ltd* [2012] QCA 114, 18 citing *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCR 189, 197-198.

⁶ *Robson v Robson* [2008] QCA 36, 52.

⁷ *Bellaluz Pty Ltd v Westpac Banking Corp* [2014] QSC 273, 13; citing *Idoport Ptd Ltd v National Australia Bank* [2001] NSWSC 744, 60-62.

⁸ *Soh v Commonwealth* [2008] FCA 1524, 10; cited in *Clack v Collins (No 1)* [2010] FCA 513, 13.

Commission he sold his spray-painting tools and equipment (from which he derived an income) after being advised by his doctor ‘to offload the business and I was not to return to that line of work.’⁹

- [13] The Applicants provided the Commission with a copy of a title search confirming Mr Michalakellis and his wife own a four-bedroom home in Redland Bay, with an accompanying mortgage which was taken out in 2017.
- [14] Although the Applicants concede the title search confirming home ownership is not determinative of Mr Michalekellis’ financial position, this factor is relied upon in support of the position he is not impecunious.
- [15] Mr Michalekellis says he is currently living at his wife’s parent’s home. Although he and his wife own their own home, they have decided to rent it out. According to Mr Michalekellis, the rent does not cover the mortgage payments, but he covers the shortfall.
- [16] It is not entirely clear how the shortfall is covered but during the hearing of this application Mr Michalekellis told the Commission he is receiving income protection payments and is entitled to receive the payments until he turns 65. He told the Commission he has very little equity in the house, as it is a recent purchase.¹⁰
- [17] Mr Michalekellis maintains the granting of a security for costs order would obstruct his ability to seek justice, but he has not provided the Commission with any additional information, such as financial records or current income and expenses, which would provide a better understanding as to how his ability to seek justice would be obstructed.
- [18] It is submitted by the Applicants that subsection 11(2) of Schedule 2 of the IR Act has a role to play, and it cannot be the case that just because an order may have the effect of stultifying the complaint, that it be an absolute bar to the making of an order for the provision of security.¹¹
- [19] The Applicants argue the bulk of proceedings under the AD Act will be brought by individuals (i.e. a natural person), many of whom may be impecunious, but have highlighted that the legislature has considered it relevant to provide the Commission with the discretion to make an order for security of costs.
- [20] In support of the position Mr Michalekellis lacks the financial capacity to meet an order requiring him to pay costs in the substantive matter, the Applicants rely on his own admission that he is unable to afford the requested security for costs amount of

⁹ T1-37, 35-40.

¹⁰ T1-38.

¹¹ T1-28–31.

\$45,000.00. The Applicants argue that it follows that in the event an adverse costs order was made, it is unlikely Ms Michalekellis will be able to meet the order.

Conclusions – Financial Circumstances

[21] In *Kiefel v State of Victoria*,¹² Mortimer J, when examining impecuniosity in the context of an application for costs, noted:

There is something of a contradiction in examining impecuniosity in the context of an application for security of costs. Asserted impecuniosity may be the catalyst for an application, because the status provides a rational foundation for the proposition that a Respondent cannot reasonably expect to recover its costs if a proceeding (or an appeal) is successfully defended. Yet, asserted impecuniosity also tells against the capacity to provide security of costs. This seems to be what underlies the consistent line of authority to the effect that impecuniosity by itself is not a justification for an order for security of costs.

...

[22] Having regard to the materials that are currently before the Commission and doing the best I can with the incomplete financial picture provided by Mr Michalekellis, there is evidence to suggest he has some financial difficulties in the sense that he has conceded he would be unable to pay the \$45,000.00 the Applicants are currently seeking. However, in circumstances where Mr Michalekellis continues to receive income protection payments and where he owns a four-bedroom home in Brisbane, I am not satisfied Mr Michalekellis is impecunious in the general sense of the word.

What is the likelihood of an adverse costs order being made against Mr Michalakellis?

[23] In considering the likelihood of an adverse costs order being made against Mr Michalakellis in the context of an application for security for costs, it is useful to have regard to not only the prospects of success or relative strengths of the claim, but also the financial circumstances of the parties, whether a party to a proceedings is acting in a way that unnecessarily disadvantages another party and the relative strengths of the claims made by each party.

Prospects of Success – Relative Strengths of the Claim

[24] The Applicants consider Mr Michalekellis' case to have no prospects of success, highlighting his limited submissions in response to the security for costs application, along with the evolving and deficient nature of his arguments in the substantive proceedings.

[25] The Applicants pointed to Mr Michalekellis' original complaint, where he did not say words to the effect that he was concerned that anyone was treating him less favourably

¹² *Kiefel v State of Victoria* [2014] FCA 604.

because he was considered to be a homosexual, or because he was Greek. Instead, it is argued his original position was that Mr Reesby bullied and treated many people less favourably.

[26] The Applicants submit that based on his current line of argument, in order to satisfy the Commission he has been directly discriminated against by one or more of the Applicants based on the alleged attributes, it will be necessary for Mr Michalekellis to produce evidence that:

- (a) The wearing of certain clothes and shoes and the listening to certain music are characteristics that can generally be used to identify a person's sexuality and are characteristics that either homosexual men generally have, or are often imputed to homosexual men; and
- (b) The behavioural traits of laziness and resilience are characteristics that can be used to identify a person's race and are characteristics that either people of the Greek race generally have, or are often imputed to people of the Greek race; or
- (c) The Second Applicant actually presumed Mr Michalekellis was a homosexual man.

[27] The Applicants argue the materials, including reports and articles sourced from the internet, upon which Mr Michalekellis proposes to rely upon as evidence in support of the assertions set out in [26] are unhelpful and/or entirely insufficient in circumstances where the authors of some of the reports are unknown, as are their credentials.

[28] Likewise, it is argued the context of at least one of the articles related to a purported stereotype that Greeks are lazy, is in no way comparable to the circumstances of the parties for the period during which the alleged actions giving rise to the complaint are said to have occurred.

[29] Other concerns raised by the Applicants about the merits of the proceeding or his conduct of the matter include:

- A lack of evidence to support an assertion that the Second Respondent (in the substantive proceedings) assumed Mr Michalekellis was a homosexual man, other than the alleged use of a series of homophobic slurs towards Mr Michalekellis, which will be denied;
- A lack of evidence in support of the assertion Mr Michalekellis was singled out for harsher treatment than his nominated comparator;

- The limited scope and relevance of the nominated comparator relied on in a claim of direct discrimination on the grounds of Mr Michalekellis' Greek racial background;
- A lack of evidence in support of the assertion that Mr Michalekellis was victimised following his complaint that the Second and Third Applicants (in the substantive proceedings) and/or engaged in an act or acts amounting to a contravention of the AD Act.

[30] The Applicants have also highlighted ongoing amendments to Mr Michalekellis' witness lists and evidence, in addition to the confusion around his reporting of events, and the extent to which they form the basis of the original complaints of discrimination or the subsequent complaint of victimisation.

[31] In response, Mr Michalekellis argues he does not have access to free legal support. He contends his funds for legal representation have depleted, which places him at a clear disadvantage in the substantive proceedings.

[32] Mr Michalekellis relies on his lack of representation as the reason why his position has evolved over time, but maintains he has strong evidence and witnesses to support his case and a belief his case will succeed at hearing.

[33] He also makes a number of broad assertions about the improper conduct of the Applicants and their representative during the course of the substantive matter and provides some commentary about a number of transcripts of secret recordings he has made of conversations between himself and a representative of the First Applicant (in the substantive proceedings) and the proposed comparator.

Conclusions – Prospects of success

[34] Although the parties' respective prospects of success may be a relevant consideration, as a general rule, there should not be a major hearing on that issue in the context of an application for security for costs.¹³

[35] I accept Mr Michalekellis' case, (as it is presently framed and without the benefit of verbal and documentary evidence that would be present in the substantive hearings), appears to be relatively weak in respect of his complaints of direct discrimination based on imputed sexuality and race. This is particularly the case having regard to the articles and comparator(s) Mr Michalekellis proposes to rely on in support of his argument.

[36] Mr Michalekellis' prospects of success in regard to his complaints of victimisation are less clear in my mind, in circumstances where there is a factual dispute about what was

¹³ *Suncare Constructions Australia Pty Ltd v Gainspace (Mackay) Pty Ltd* [2016] QSC 67, 11.

said to Mr Michalekellis by Mr Reesby and any detriment he suffered in the wake of his complaint about the alleged conduct.

Genuineness of the proceeding

[37] The Applicants submit Mr Michalekellis' true motivation for pursuing his complaint is a desire to obtain financial compensation from the Applicants by any means necessary. The Applicants point to the multiple applications filed in other jurisdictions, the excessive costs they have incurred and evolving nature of his complaints over time.

[38] In support of their position, the Applicants point to:

- A suggestion by Mr Michalekellis (while still providing services to the First Applicant) that a resolution to his complaint would be an agreement by the First Applicant to award him a 'two-year contract' for work, which was refused;
- Shortly thereafter, a Workers Compensation claim was filed by Mr Michalekellis, which was later refused;
- Mr Michalekellis then filed an Application for an Order to Stop Bullying, which was also dismissed;
- An application for General Protections was also filed in the Fair Work Commission, which did not progress;
- Thereafter a complaint was lodged with the Anti-Discrimination Commission.

[39] The Applicants also rely on correspondence between Mr Michalekellis and Maurice Blackburn, which was provided to the Commission by Mr Michalekellis.

[40] It is argued the correspondence exposes Mr Michalekellis' true motivation for pursuing legal action against the Applicants, with his advisors having referred to applying 'further pressure' by naming employees of Brisbane BMW in a number of the applications and "engaging with the media" to achieve the express goal of "pushing the Respondents to take your allegations seriously and to come to conciliation with a willingness to resolve the matter by way of a financial settlement".

[41] It is argued Mr Michalekellis has, over time, attempted to "shoehorn" his version of events into meeting the criteria of the relevant jurisdiction and vexatiously pursued the substantive proceedings against the Applicants when all other causes of action have failed to result in a financial settlement.

- [42] In response, Mr Michalekellis argues the application for security for costs is an attempt by the Applicants to delay the substantive matter.
- [43] Notwithstanding his status as a contractor, Mr Michalekellis submits he received legal advice to pursue his complaint through the Fair Work Commission. As best I understand it, the rationale behind this decision was to force Brisbane BMW to conciliation within a shorter time-frame, with a view to resolving the complaint more efficiently and presumably at less cost.
- [44] According to Mr Michalekellis he has since complained about the legal advice and guidance he received in so far as it related to him pursuing matters through the Fair Work Commission. He contends that as a (now) self-represented litigant, he has struggled to articulate his case effectively. As a result of advice from various parties, he has formulated his case as it exists today.¹⁴
- [45] Mr Michalekellis acknowledged he requested a two-year contract, but only in circumstances where he was concerned about the victimisation he would experience after complaining about Mr Reesby's conduct.

Conclusions – Genuineness of the proceeding

- [46] To an extent, it is true that Mr Michalekellis' complaints, which were the subject of earlier applications in the Fair Work Commission, have evolved and broadened from bullying of himself and others at Brisbane BMW, to more specific claims of direct discrimination and victimisation.
- [47] Mr Michalekellis has also lodged multiple applications in pursuit of a resolution to his claim and thus far, has had no success.
- [48] In an email to a prior legal representative he noted:

Hopefully you and...can help me with the cost to me of the next step considering the general protections application was never applicable to me and generated a large part of my bill.

I feel a bit hard done by that they have gotten away with it so far so I'm not ready to give it up just yet.

How likely is it that I can proceed with media? Now that they have admitted to some of the things is it not defamation?

- [49] Having regard to correspondence provided to the Commission, I accept Mr Michalekellis initially received advice to pursue his complaints through WorkCover and later, the Fair Work Commission despite his contractor status and other

¹⁴ T1-40, 15.

circumstances which eventually led to several jurisdictional arguments being run against those applications.

- [50] Although I accept that one of the main drivers underpinning Mr Michalekellis' current application is an order from the Commission requiring the Respondents (in the substantive proceedings) to pay a significant amount of compensation for loss and damage, I don't doubt the genuineness of Mr Michalekellis' belief that he has meaningful grievances with the Applicants that, in his mind, need to be resolved.
- [51] Whether or not those grievances are able to be characterised as discrimination and victimisation in the form he is alleging is a matter for the substantive proceedings.
- [52] As such, I am not satisfied that the factors relied on by the Applicants (in this matter) support a finding that Mr Michalekellis is vexatiously pursuing the substantive matter.
- [53] Having regard to my conclusions above in respect of the financial circumstances of Mr Michalekellis, his prospects of success and the genuineness of his claim, I am not able to conclude on the materials before me whether an adverse costs order would be made against Mr Michalekellis in the event he was unsuccessful or the quantum of any costs order.

Will the making of a security for costs order prevent Mr Michalekellis from having his complaint determined?

Potential stultification of the appeal if security is ordered

- [54] Mr Michalakellis has asserted the success of the application for security of costs will obstruct his ability to seek justice.
- [55] Although I accept the Applicants have the burden of persuading the Commission the order should be made, the authorities suggest the party resisting security (where it is claimed the proceeding may be stultified) has an onus to demonstrate the effect.¹⁵
- [56] Aside from his assertion that such an order will obstruct his ability to seek justice, Mr Michalakellis has not provided any information to the Commission about his financial circumstances nor made any detailed submissions as to the impact a costs order would have on his ability to pursue the substantive matter.
- [57] On the materials currently before the Commission, it's not possible to determine whether an order for costs, or the extent to which such an order, would stultify the proceedings.

¹⁵ *Madgwick v Kelly* (2013) 212 FCR 1; [2013] FCAFC 61, 81.

What other matters should the Commission consider when determining whether to make a security for costs order?

Whether impecuniosity arises out of the conduct complained of

- [58] Mr Michalakellis maintains he was diagnosed with severe anxiety and depression due to the way he was treated by Mr Reesby in December 2017. He submits the failure of the Applicants to effectively respond to his complaints of bullying and the subsequent victimisation he endured after he raised his concerns, resulted in him being certified as being unable to work in April 2018.
- [59] He contends his doctor later advised him ‘not to return to that line of work’. Thereafter, Mr Michalakellis sold his equipment, which led to a situation where he no longer had equipment from which to derive an income.
- [60] In support of his claims that he is no longer able to work as a result of the conduct of the Applicants, Mr Michalakellis has submitted a medical certificate dated 21 November 2018, which notes:
- Mr Michalakellis first complained of work-related stress and anxiety on 5 December 2017;
 - He has since been diagnosed with anxiety and depression.
- [61] It is not clear from this certificate which specific work factors, conduct or events led to Mr Michalakellis’ complaint of stress or anxiety.
- [62] During the hearing of this application, the Commission was provided, following agreement by both parties, with a copy of Mr Michalekellis’ medical summary which is a little more helpful. In a medical consultation record dated 5 December 2017, Dr Chia Wong noted:

Consultations:

Surgery consultation recorded by Dr Chia Wong on 05/12/2017

Symptoms of anxiety for several years

Works as painter for 2 years own business

Prev worked as car salesman for 5 years

Work Stress

Tremors, voice changes in dealing with difficult personalities

Affecting personal relationships

Wife is pregnant¹⁶ (my emphasis)

¹⁶ Exhibit 1.

[63] A subsequent record dated 13 April 2018, the final day Mr Michalekillis provided services to Brisbane BMW and one week prior to lodging a Workers Compensation claim, notes:

Surgery consultation recorded by Dr Chia Wong on 14/0402018

Work related stress

Patient used term “bullying”

Ongoing for past 2 years since he worked with this car company

Incidents at work with 1 particular person

- Dimitri has been called names
- Racial remarks
- Dimitri was asked to “toughen up”

Incidents are recurrent

He informed the HR of the car company but apparently nothing would change”

[64] It is a relevant consideration that an order for security for costs would effectively shut a party out of relief in circumstances where the party’s impecuniosity is itself a matter which the litigation may help to cure.¹⁷

[65] There may be a range of factors that contributed to Mr Michalekellis’ decision to sell his equipment, which in turn contributed to his current financial position, however it is clear from the medical evidence before the Commission that one of the reasons was the onset of his depression and his inability to continue to work, which he maintains occurred as a result of being bullied at work.

[66] Although it is not entirely clear which work colleagues or workplace Mr Michalakellis’ GP is referring to, in the absence of other evidence highlighting a pre-existing condition, a propensity to develop depression or other non-work events which may have caused him to become unwell, the contemporaneous medical evidence in front of the Commission supports a conclusion that Ms Michalakellis’ interaction with work colleagues may have contributed to the either an onset of depression and anxiety, or at least the aggravation of any existing condition.

[67] Given the lack of detailed medical reports or financial records before the Commission, I am unable to arrive at any firm conclusions about whether his interactions at work solely or predominantly contributed to Mr Michalakellis’ depression and current financial position.

¹⁷ *Merribee Pastoral Industries v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502.

The timing of the application for security

[68] The evidence indicates the Applicants have been pursuing Mr Michalakellis for the provision of security for costs since shortly after the matter was unable to be resolved through conciliation. I am satisfied there has been no delay in making the application.

Considerations where the litigant is a natural person

[69] The basic rule that a natural person who sues will not be ordered to give security for costs, however poor, is ancient and well established.¹⁸

[70] The Applicants accept that in proceedings involving a natural person, that a plaintiff's likely inability to meet an order for costs carries less weight than if the Applicant was a corporation. It is also acknowledged the impecuniosity of the individual litigant is a relevant factor. Certainly, there has been a historical inclination of courts to not order security for costs against natural persons.

[71] In *Ninan v St George Bank Ltd*,¹⁹ Justice Griffiths cited *Knight v Beyond Properties Pty Ltd*²⁰ in which Lindgren J described the historical disinclination of courts to order natural persons to provide security and identified the kind of circumstances in which security for costs has been ordered against natural persons:

Many cases can be cited for the proposition that there is a disinclination to order an Applicant who is a natural person to provide security, at least, in the absence of some factor in addition to impecuniosity.

...

In the cases in which natural persons have been ordered to provide security, some factor in addition to impecuniosity has been present; cf *Barton v Minister for Foreign Affairs* (1984) 2 FCR 463 (Morling J) at 594 (impecuniosity **and** residence outside Australia); *Cunningham v Olliver* (unreported, Burchett J, 21 November 1994) (but for delay, security would have been ordered on ground of impecuniosity **and** bringing of claim to a significant extent for benefit of others); *Chang v Comcare Australia* [1999] FCA 1677 (Moore J) at [32] (impecuniosity **and** lack of prospects of success); *Loque v Hansen Technologies Ltd* [2003] FCA 81 (Weinberg J) (impecuniosity **and** residence outside Australia);

...

[72] Although Mr Michalekellis has conceded he would be unable to pay a security for costs order and is currently not working, I am less confident of the existence of other factors, that could shift the balance of consideration in favour of the Applicants. That is, although I consider certain aspects of Mr Michalekellis' argument in relation to discrimination to be weak, his prospects are less clear in relation to his complaint of victimisation. Likewise, although I accept the Applicants have already incurred costs in

¹⁸ *Pearson v Naydler* [1977] 1 WLR 899, 902.

¹⁹ *Ninan v St George Bank Ltd* [2012] FCA 905.

²⁰ *Knight v Beyond Properties Pty Ltd* [2005] FCA 764, 32-33.

complying with the Directions for the substantive matter, the overall costs are largely unknown at this stage.

Should the Commission make an order for security for costs in the amount of \$45,000.00, or some other amount?

[73] Justice Daubney in *Hyperion Technology Pty Ltd v Queensland Motorways Ltd*²¹ reasoned that the discretion to order costs is to be exercised after taking into account all of the circumstances of the case. The impecuniosity of the plaintiff will always be a relevant, and sometimes decisive factor. However, Daubney J spoke in terms of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), which specifies that an impecunious corporate plaintiff may have to provide security for costs before they can seek assistance from the court.

[74] The security for costs provision as it is set out in Schedule 2 of the IR Act has not yet been considered in this Commission. However, the provision is mirrored in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). The following comments from Senior Member Brown in *Ultimate Property One Management Pty Ltd v Body Corporate for the Pivotal Point Residential CTS 33550*²² (*Ultimate*) are applicable here:

The relevant starting points for considering the awarding of costs in the Tribunal on the one hand, and in the courts under the Uniform Civil Procedure Rules 1999 (Qld) (“UCPR”) under the other, are quite different. Whereas in the Tribunal, the starting point is that each party must bear their own costs, the UCPR provides that the costs of a proceeding are in the discretion of the court but follow the event unless the court orders otherwise [see: UCPR, r681(1)]. This distinction is an important one and a note of caution must be sounded when considering an application for security of costs in the Tribunal and applying relevant principles derived from authorities dealing with applications for security of costs in the courts.²³

[75] Similar to the approach adopted by Senior Member Brown in *Ultimate*, in this matter there is no threshold to be established by a party seeking security for costs under the IR Act, as is found in the UCPR. The Commission’s discretion to order security for costs is therefore a broad one but it must be exercised judicially.

[76] The following principles espoused by Member Stilgoe (as she then was) in the Queensland Civil and Administrative Tribunal are also relevant:

Section 109(4)(a) of the Queensland Civil and Administrative Tribunal Act 2009 is very different in terms from Rule 671(a) of the Uniform Civil Procedure Rules and for good reason. The tribunal is not a court. It has a specific statutory obligation to deal with matters in a way that is accessible, fair, just, economical, informal and quick. It must encourage the early and economical resolution

²¹ *Hyperion Technology Pty Ltd v Queensland Motorways Ltd* [2013] QSC 20, 12.

²² *Ultimate Property One Management Pty Ltd v Body Corporate for the Pivotal Point Residential CTS 33550* [2017] QCAT 424.

²³ *Ibid*, 10.

of disputes. It must ensure that proceedings are conducted in an informal way that minimises costs to parties and is as quick as is consistent with achieving justice. It must act with as little informality and technicality and with as much speed as proper consideration of the matter before it permits.²⁴

[77] This has been a challenging application to determine, particularly in circumstances where I have some sympathy for the Applicants, given they have already incurred costs in the defence of the substantive matter and multiple other proceedings initiated by the Applicant in different jurisdictions.

[78] Although Mr Michalekellis maintains he would be unable to pay a security for costs order, his financial circumstances are unclear. He owns his own home, albeit with a small amount of equity and continues to receive income protection payments. In those circumstances I am not entirely satisfied that he would be unable to pay an adverse costs order if he was unsuccessful in his claim.

[79] Although I hold some concerns about the way his complaint is currently framed, I am not persuaded it is entirely hopeless. I am also not satisfied the complaint is being pursued for an improper purpose, or vexatiously.

[80] Due to a lack of information about his financial situation, I am unable to determine, with any certainty, the extent to which an order for security for costs would stultify the proceedings, however I note Mr Michalakellis' submissions that his access to justice would be affected if an order was made.

[81] I accept, given he is currently not working, that an order for security for costs in the amount proposed by the Applicants may impede Mr Michalakellis' access to a resolution of his complaint.

[82] In the event a costs order is made in favour of the Applicants in the substantive proceedings, I am not persuaded the Applicants have demonstrated he would be unable to satisfy such an order.

[83] Weighing all the relevant considerations, I conclude that no order for security for costs should be made.

[84] **Order**

1. The application for security for costs is refused.

²⁴ *Greg Black Constructions Pty Ltd v Brodie and Anor* [2011] QCAT 671.

I certify that the preceding 84 paragraphs are a true copy of the Reasons for Decision of Industrial Commissioner Knight.

M.L. Knight, Industrial Commissioner:
(Signature)

Dated:

**NOTE: THIS CERTIFICATION IS TO BE REMOVED FROM THE DECISION
BEFORE IT IS RELEASED TO THE PARTIES**